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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1090

DAVID LAWRENCE NELSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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INDEX

	Page
Introductory Statement	1
Jurisdictional Statement	2
Questions Presented for Review	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	5
Argument	5
1. Was the petitioner prejudiced by the trial court in making a Simmons issue determination when the entire photographic spread shown to the complaining witness in Count One of the information was not before the court, and in ruling that the petitioner did not fall within the facts and law as laid down by this Court in the case of Davis v. Mississippi, Supra?	5
Conclusion	6
Appendix A—Judgment of United States Court of Appeals, Fifth Circuit	A-1
Appendix B—Order of United States Court of Appeals, Fifth Circuit	A-2

AUTHORITIES CITED

Cases

Davis v. Mississippi, 394 U.S. 721 (1969) 3, 4, 6

Simmons v. United States, 390 U.S. 377 (1968) 2, 4

U.S. v. Ballard, 423 F.2d 127 (1970) 2

U.S. v. Sutherland, 428 F.2d 1152 (1970) 2, 4

Statutes of the United States

Title 36, Code of Federal Regulations, Section 2.7(b)(2) . . 3

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INTRODUCTORY STATEMENT

The petitioner, David Lawrence Nelson, respectfully petitions for a writ of certiorari to review a judgment and order made by the Court of Appeals for the Fifth Circuit not yet reported, but styled, "David Lawrence Nelson v. United States", affirming a judgment against the petitioner made and entered by the United States District Court for the Southern District of Mississippi, Jackson Division, on May 3, 1973.

The Court of Appeals affirmed the judgment of the District Court per curiam without an opinion. This case was decided by the United States Court of Appeals for the Fifth Circuit on November 7, 1973, and a petition for rehearing was denied on December 12, 1973. The petitioner did not receive notice his case had been affirmed until November 16, 1973. An order granting leave to file a petition for rehearing and stay of mandate was granted on the condition that the petitioner filed with this court a petition for writ of certiorari no later than January 11, 1974.

A Multilith Appendix was filed with the Court of Appeals for the Fifth Circuit and a true and correct copy of the Multilith Record has been filed. All references herein to the record are to the Multilith Appendix.

JURISDICTIONAL STATEMENT

Petitioner believes this Court has jurisdiction to review the decision by writ of certiorari by virtue of 28 USC 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Was the petitioner prejudiced by the trial court in its departure from the doctrine laid down in the case of **Simmons v. United States,** 390 US 377 (1968), in that (a) a photographic spread was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification, (b) when the trial court did not follow the procedural guidelines relating to photographic identification laid down by the Fifth Circuit Court of Appeals in the case of **United States v. Sutherland,** 428 F.2d 1152 (1970), and **U. S. v. Ballard,** 423 F.2d 127 (1970), in that the trial court made a **Simmons** issue determination when the entire photographic spread that was shown to the complaining witness was not before the trial court?

2. At the time that the photographs were taken of the petitioner was he under an illegal arrest as defined by this Court in the case of **Davis v. Mississippi,** 394 US 721 (1969)?

STATUTES INVOLVED

This case involves Title 36, Code of Federal Regulations, Sub-Section 2.7 (b)(2).

STATEMENT OF THE CASE

The petitioner was charged with a two-count information in violation of Title 36, **Code of Federal Regulations,** Section 2.7(b)(2) in engaging in disorderly conduct on the Natchez Trace, a federal parkway. Both counts of the information charged the petitioner with substantially the same offense against two different white females, one occurring on or about November 14, 1972, and the other occurring on or about March 17, 1972. The alleged offenses took place on the Natchez Trace Parkway between Fayette in Jefferson County, and in Natchez in Adams County, Mississippi.

The defendant is a negro male in his mid-twenties who is a resident of nearby Fayette, and works in Natchez. The defendant is employed at a paper mill in Natchez, and has been active in promoting and protecting the rights of all negroes in the employment practices of the paper mill. He has thereby created a tremendous amount of ill will and animosity toward him as a result of his activities enforcing his civil rights.

The government's evidence against the petitioner consisted entirely of the testimony of the two complaining witnesses. Testimony of those two witnesses, with particular regard to their identification of the petitioner, was predicated on the fact that they were shown photographic spreads; and from the spreads, they picked out the petitioner as being the culprit of the alleged

crimes. This is notwithstanding the fact, in regard to Count Two of the information, the complaining witness observed the petitioner leaving his place of employment and could not identify him, although she was within only a very few feet of the petitioner (App. 127).

The Court's attention is called to the government's exhibit No. 1, which is part of the photographic spread shown to the complaining witness in Count One of the information. With the exception of the defendant, the other pictures have law enforcement agency identification tags hanging around the necks of people, with the exception of one photograph of a soldier in uniform. The identification plates show the Houston, Texas, Police Department, and the Harris County, Texas, Sheriff's Department. The alleged offense occurred in the State of Mississippi while the complaining witness in Count One was a resident of Natchez; but the photographic spread, with the exception of the defendant, indicates pictures of people who were in Texas (App. 312).

The government's witness in Count One was also shown another picture of the defendant, which she also picked out as being him, according to her testimony; but this picture was not available to the defendant or his counsel at trial (App. 104). Timely objection was made on the grounds that the learned trial magistrate could not make a determination in accordance with **U.S. v. Sutherland,** *supra*, because the entire spread of photographs was not before him, as per the testimony of the government's witness. However, notwithstanding this fact, the learned trial magistrate decided to completely ignore and dispense with the guidelines, both procedural and substantive, laid down by this Court and make his own law and overrule the objections of the defendant, even over the objection of the United States Attorney (App. 40, 107).

At the trial the complaining witness in Count Two of the information stated that she could not positively beyond a reason-

able doubt and to a moral certainty say at the time that the petitioner was the culprit who committed the alleged offense against her on the date in question. She only stated that she could be very positive about the car (App. 141, 147).

REASONS FOR GRANTING THE WRIT

The decision rendered by the Court of Appeals for the Fifth Circuit is, with deference, in conflict with **Simmons v. U.S.,** *supra*, and in conflict with **Davis v. Mississippi,** *supra*. This case involves an important question of federal law which should be settled by this Court under its supervisory powers.

ARGUMENT

1. Was the petitioner prejudiced by the trial court in making a Simmons issue determination when the entire photographic spread shown to the complaining witness in Count Two of the information was not before the court, and in ruling that the petitioner did not fall within the facts and law as laid down by this Court in the case of **Davis v. Mississippi,** *supra*?

Simmons v. U.S., *supra*, and other cases from various circuits have laid down the substantive and procedural law concerning the use of photographic spreads for identification. It is respectfully submitted that in the spirit of **Simmons** and all other case law concerning photographic spreads that a trial court cannot make a correct and legal **Simmons** issue determination when the entire photographic spread is not before the court, which is the case at bar.

It is respectfully submitted that the facts of this case will clearly show that the manner in which the photographs were taken of the petitioner in time and place by agents of the Federal Bureau of Investigation and also state law enforcement agents

while he was clearly under an illegal arrest puts the petitioner squarely within the law as laid down by this Court in **Davis v. Mississippi,** *supra.*

CONCLUSION

Petitioner respectfully submits that a review of the record would indicate that this petition for writ of certiorari should be granted, and that the judgment of the Circuit Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Southern District of Mississippi, Jackson Division, should be set aside, the judgment of conviction reversed, and this cause remanded for a new trial.

Respectfully submitted

FRED A. ROSS, JR.
514 Barnett Building
Jackson, Mississippi 39201
Counsel for Petitioner

APPENDIX A

United States Court of Appeals for the Fifth Circuit

October Term, 1973

No. 73-2010

Summary Calendar

D. C. Docket No. CR 73-J-18 (C)

United States of America,
Plaintiff-Appellee,

versus

David Lawrence Nelson,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

Before Wisdom, Ainsworth and Clark, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 7, 1973

Issued as Mandate:

APPENDIX B

United States Court of Appeals for the Fifth Circuit

United States of America,
Plaintiff-Appellee,
versus
David Lawrence Nelson,
Defendant-Appellant.

No. 73-2010

On Consideration of the Application of the Appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. It Is Ordered that the issuance of the mandate of this Court in said cause be, and the same is stayed to and including January 11, 1974, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. It Is Further Ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

JOHN MINOR WISDOM
United States Circuit Judge

No. 73-1090

In the Supreme Court of the United States

OCTOBER TERM, 1973

DAVID LAWRENCE NELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1090

DAVID LAWRENCE NELSON, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that photographs used in a pretrial identification process were impermissibly suggestive, that the district court's evaluation of the photographs was improper because the court did not have before it the entire photographic spread, and that evidence of the pretrial identifications should have been excluded because the picture of petitioner included in the spread was taken during an unlawful arrest.

After being charged with two counts of disorderly conduct by making "offensively coarse gesture and display" on land acquired for federal use, in violation of 36 C.F.R. 2.7(b)(2),[1] petitioner was

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[1]Under 16 U.S.C. 3 the Secretary of the Interior is authorized to make "such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service * * *." The Section further provides that any violation

summoned to appear before the United States District Court for the Southern District of Mississippi. He waived trial by jury and consented to be tried by the United States Magistrate (R. 4).[2] Following his conviction, petitioner was sentenced to imprisonment for consecutive terms of six months on each count. The district court issued an order and opinion affirming the conviction (R. 318-321), and the court of appeals affirmed the judgment of the district court (Pet. App. A1).

The principal government witnesses were two women before whom petitioner indecently exposed himself on the Natchez Trace, a federal parkway in Mississippi. Mrs. Marguerite Brown, the victim involved in Count 2, testified that on March 17, 1972, she was driving alone on the Trace when a man—whom she identified as petitioner at trial (R. 121-122)—sped past her in a Blue Mustang "Mach I" and drove out of sight (R.112-113). Shortly thereafter, she saw the same car parked on the highway (R. 113) and its driver standing nearby, naked from the waist down and with his hand on his penis (R. 115-116, 143). Mrs. Brown observed him for several minutes, and at one point was only about six feet from him, before she managed to turn off and drive away (R. 114, 115, 118). About six weeks later Mrs.

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of such rules "shall be punished by a fine of not more than $500 or imprisonment for not exceeding six months or both * * *." The provisions of 36 C.F.R. 2.7 were promulgated pursuant to the authority conferred by, *inter alia*, 16 U.S.C. 3.

[2]"R." refers to the Appendix to the briefs in the court of appeals (containing, *inter alia*, the transcript of the trial), a copy of which has been lodged with this Court.

Brown was brought by the local sheriff to the paper mill where petitioner worked, and from a small viewing room she singled out petitioner from about a hundred employees as the man she had seen on the Trace, although she could not make the identification with certainty (R. 124-130).

Mrs. Jennie Cole, the victim involved in Count 1, testified to a similar incident that occurred on the Trace on November 14, 1972 (R. 33-41). From six feet away she "clearly" (R. 40) observed the offen-der-identified by her as petitioner at trial (R. 46)—stepping out naked from behind a white car and moving toward her with a "set expression on his face" (R. 35-37). Swerving away, she drove to Jackson, Mississippi, to report the incident (R. 38).

On December 20, 1972, after investigations by federal and state agents had pointed to petitioner as a likely suspect (R. 124-130, 178-179, 188-190), the local sheriff called petitioner by telephone and stated that "two cats from Natchez" (referring to two FBI agents) wanted to talk to him (R. 180). Petitioner arrived at the sheriff's office—"freely and voluntarily" (R. 181)—within about ten minutes, and went into an office with the two agents. After explaining that they were investigating incidents of indecent exposure on the Natchez Trace, the agents read aloud a waiver-of-rights form, which petitioner read and signed (R. 199, 217-219).Petitioner denied any involvement in the offenses (R. 219).

At the conclusion of the interview, one of the agents asked petitioner's permission to have his photograph taken for an "elimination spread" to identify the offender (R. 219). The agent reminded petitioner of his rights and told him that he did not have to be

photographed without his consent; petitioner replied that he wanted to cooperate fully "to clear this entire mess up" (R. 220-221). One of the interviewing agents testified that petitioner was not then under arrest and could have left the sheriff's office at any time he desired (R. 222).

In February 1973, Mrs. Cole was shown a photographic spread containing pictures of five men, including the picture of petitioner taken earlier by the FBI agents (R. 41-45). She identified the picture of petitioner "immediately" (R. 42; G. Ex. 1, R. 312314) and also recognized a photograph of his car (R. 45). A similar spread containing six photographs was shown to Mrs. Brown, who also identified petitioner's photograph as being that of the offender (R. 130-137; G. Ex. 2, 315-317).

1. Petitioner contends that his conviction, based in large part on eyewitness identifications at trial, should be set aside on the ground that the pretrial procedure for photographic identification was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" (*Simmons* v. *United States*, 390 U.S. 377, 384). Directing his attack at the snapshots shown to Mrs. Cole, the complaining witness in Count 1, petitioner argues that, though the offense occurred in Mississippi, "the photographic spread, with the exception of the defendant, indicates pictures of people who were in Texas" (Pet. 4).

Of the five persons whose photographs appear in that spread,[3] two have identification tags with Texas

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[3]The photographic spreads shown to the victims involved in each count are reproduced at R. 312-317.

markings above the numbers; another is wearing a tag with no state or county markings visible; and two men—petitioner and a uniformed soldier—are wearing no identification tags at all. The collection does not unfairly single out petitioner. Nothing in Mrs. Cole's testimony suggests that because the offense occurred in Mississippi she tended to eliminate pictures apparently taken in a nearby State. Indeed, she recognized the picture of petitioner without hesitation (R. 42). As the district court properly concluded, in agreement with the magistrate's findings (R. 72-73, 154-155), "[b]oth prosecuting witnesses unmistakably identified [petitioner] from photographs properly taken and properly authenticated, and likewise independently and unmistakenly identified [petitioner] as the culprit from the photographs and in person at the trial. There was literally nothing suggestive or impermissible in the identification of [petitioner] to even indicate any tinge of unfairness or suggestiveness as to his identity" (R. 319-320).

2. Petitioner also contends (Pet. 4) that the trial court could not properly evaluate the circumstances of pretrial photographic identification by the victim in Count 1,[4] since the court had before it only one of the two snapshots of petitioner used in the original spread. The record shows, however, that the photographs in Exhibit 1 (which contains one picture of petitioner, R. 313) were the complete set shown to Mrs. Cole. She testified that the agents had shown her

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[4]Petitioner asserts at one point that the entire spread involved in Count 2 was not before the court (Pet. 4). As his statement of the facts indicates *(ibid.)*, however, he apparently intends to refer to the pictures involved in Count 1.

"five photographs of various men" (R. 44) and later identified Exhibit 1 as those photographs (R. 47). The FBI agent who took petitioner's picture stated that the forwarded only one copy for inclusion in the spread shown to Mrs. Cole (R. 214-215). After a thorough discussion of this matter by both sides (R. 104-109), the Magistrate concluded that the agents had never exhibited any additional picture of petitioner (R. 109). [5]

In any event, there is nothing in the record to suggest that the inclusion of an extra snapshot in the spread exhibited to Mrs. Cole would have been impermissibly suggestive. Since there were two photographs of three of the five people pictured in Exhibit 1, a second snapshot of petitioner would not have singled him out. Moreover, as indicated above, it is clear that Mrs. Cole was influenced solely by the facial appearance of the people photographed; she selected petitioner's picture immediately, even before she saw all the photographs (R. 42, 56-57, 60, 70-71).

3. Relying on *Davis* v. *Mississippi,* 394 U.S. 721, petitioner argues finally (Pet. 5-6) that evidence of pretrial photographic identifications should have been

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[5]The confusion on this point seems to have arisen because Mrs. Cole had mentioned seeing a photograph of petitioner with a goatee, whereas no goatee appeared visible in the picture of petitioner before the court. As further discussion revealed (R. 109), the picture of petitioner in Exhibit 1 was a copy of that shown to Mrs. Cole and did in fact show petitioner with a goatee, although it is difficult to discern because of the grainy quality of the reproduction.

excluded as the product of an unlawful arrest. Contrary to petitioner's assertions, he was not under arrest or under any kind of coercion at the time he was photographed. Responding to the sheriff's telephone call, he freely went to that office; he signed a waiver-of-rights form and consented to be photographed, evidently having decided that the best tactic was to appear eager "to clear this entire mess up" (R. 220-221). He was never given the impression that he was being forcibly detained. The magistrate therefore properly rejected the claim that petitioner's picture was taken while he was unlawfully under arrest (R. 235-239).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

DOJ-1974-05